



Virginia
Regulatory
Town Hall

Proposed Regulation Agency Background Document

Agency Name:	Virginia Department of Health
VAC Chapter Number:	12 VAC 5-585
Regulation Title:	Amendments to the Biosolids Use Regulations
Action Title:	Review of Regulatory Package
Date:	April 10, 2003

This information is required pursuant to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), Executive Order Fifty-Eight (99), and the *Virginia Register Form, Style and Procedure Manual*. Please refer to these sources for more information and other materials required to be submitted in the regulatory review package.

Summary

Please provide a brief summary of the proposed new regulation, proposed amendments to an existing regulation, or the regulation proposed to be repealed. There is no need to state each provision or amendment or restate the purpose and intent of the regulation; instead give a summary of the regulatory action and alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

A Petition for Rulemaking was submitted to the Virginia Department of Health by several corporations that have been issued permits for land application of biosolids in various Virginia Counties. The Petition requested that the Biosolids Use Regulations be amended with respect to the following requirements: 1. Posting of informational signs at permitted sites prior to and during land application of biosolids 2. Evidence of financial responsibility in a determined amount, provided by permit applicants and maintained by permitted entities. 3. Notification of Local Governments prior to the land application of biosolids at specific sites. The contents and timing of such notices is to be specified. 4. Development and implementation of spill prevention and response plans by permitted entities. 5. Methods for communicating information on complaints and reported incidents related to or arising from the land application of biosolids.

Basis

Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable, please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority must be provided. Please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the proposed regulation and that it comports with applicable state and/or federal law.

The Virginia Department of Health has received a Petition for Rulemaking from specific regulated entities, requesting that the Biosolids Use Regulations (12VAC 5-585) be amended to address certain issues raised by various Local Governments. The Biosolids Use Regulations (12 VAC 5-585) were adopted by the Board of Health, in 1995, under Section 32.1-164.5 of the Code of Virginia. The Biosolids Use Regulations were subsequently revised, effective on October 15, 1997, in accordance with the Virginia Administrative Process Act (APA). The APA (Section 2.2-4007.A of the Code of Virginia) provides that any person may petition an Agency to amend an existing regulation.

Purpose

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the proposed regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.

These amendments are to be designed to provide a consistent and uniform set of State requirements that will address a number of issues that Local Governments must routinely deal with. It is anticipated that the development of State requirements will eliminate the need to develop non-uniform local requirements in these areas of concern and prevent extended litigation, brought by permitted entities, concerning restrictive Local Government ordinances.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement providing detail of the regulatory action's changes.

The Petition for Rulemaking was submitted by Synagro WWT, Inc., Recyc Systems, Inc., and Nutri-Blend Inc., corporations that have been issued permits for land application of biosolids in various Virginia Counties, through the Biosolids Use Regulations (12 VAC 5-585). The Petition for Rulemaking requests that the Biosolids Use Regulations be amended with respect to the following requirements:

1. Posting of informational signs at permitted sites prior to and during land application of biosolids. Specifying sign dimensions, informational content and location.
2. Evidence of financial responsibility (such as liability insurance or other financial resources) in a determined amount, provided by permit applicants and maintained by permitted entities, established for the purpose of compensating third parties for personal injury or property damage, and removing or remediating any established environmental contamination, resulting from the land application of biosolids.
3. Notification of Local Governments prior to the land application of biosolids at specific sites. The contents and timing of such notices is to be specified.
4. Development and implementation of spill prevention and response plans by permitted entities. Such plans are to also address the tracking of residues on State Roads by biosolids transport vehicles.
5. Methods for communicating information on complaints and reported incidents related to or arising from the land application of biosolids.

The requested amendments to the Biosolids Use Regulations will involve the following specific sections of the regulations:

1. 12 VAC 5-585-310
2. 12 VAC 5-585-460
3. 12 VAC 5-585-480
4. 12 VAC 5-585-490

Issues

Please provide a statement identifying the issues associated with the proposed regulatory action. The term "issues" means: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please include a sentence to that effect.

The petition was brought before the State Board of Health at their April 26, 2002 meeting for consideration of initiating the rulemaking process. The State Board of Health approved the development of amendments to the Biosolids Use Regulations followed by publication of a Notice of Intended Regulatory Action (NOIRA) at that meeting. Proposed amendments were subsequently developed through the the Biosolids Use Regulations Advisory Committee (BURAC) and brought to the State Board of Health at their October 25, 2002 meeting. The State Board of Health approved the proposed revisions at that meeting, with the provision that any public comments received following publication of the NOIRA be considered for any justified changes to the proposed amendments prior to publication in the Virginia Register. The NOIRA

public comment period closed on December 6, 2002. The public comments received up to that date did not raise any new issues that had not been discussed at prior BURAC meetings. The majority of the BURAC members were in favor of the draft amendment language. However, several members of the committee requested that more stringent requirements be included in the draft revisions and filed a minority report to the State Board of Health together with the Virginia Department of Health staff report. A few of the BURAC minority report recommendations were incorporated into the proposed amendments. In addition, a majority of committee members requested that the requirements for submittal of notifications to local government and requirements for posting of signs at land application sites be discretionary on the desires of local government. Thus, these requirements would only take effect if required by an adopted local ordinance.

The advantage of adopting the requested amendments is that the credibility of this controversial state permit program will be enhanced. The availability of financial resources to support cleanup costs due to any pollution resulting from the land application of biosolids, was deemed by the public and local government, to be a key issue in assuring the safety of those operations. However, the lines of authority, to require that specific insurance provisions be provided for issuance of land application permits, are not entirely clear.

By establishing reasonable requirements for land application operations, the most economical and most beneficial means of sludge management will continue to be available to the owners of sewage treatment works, who are primarily metropolitan governments.

Fiscal Impact

Please identify the anticipated fiscal impacts and at a minimum include: (a) the projected cost to the state to implement and enforce the proposed regulation, including (i) fund source / fund detail, (ii) budget activity with a cross-reference to program and subprogram, and (iii) a delineation of one-time versus on-going expenditures; (b) the projected cost of the regulation on localities; (c) a description of the individuals, businesses or other entities that are likely to be affected by the regulation; (d) the agency's best estimate of the number of such entities that will be affected; and e) the projected cost of the regulation for affected individuals, businesses, or other entities.

Currently, nearly 200,000 dry tons of biosolids are land applied each year in 20 to 30 Counties, on approximately 42,000 acres of farmland. The potential cost savings and production increases, for the farmers that receive biosolids as a substitute fertilizer, has been estimated to range from \$50, to more than \$100, per acre farmed. The VDH implements the Regulations through the Office of Environmental Health Services, using about 2 years of staff time annually at a cost of approximately \$150,000.

The financial responsibility requirement of \$1,000,000 in insurance should have no impact on the biosolids use contracting firms as they are currently purchasing such insurance as part of the price of doing business.

The costs of posting signs at land application sites is not considered to be significant and will not restrict the contractor operations.

Detail of Changes

Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description - or cross-walk - of changes implemented by the proposed regulatory action. Where applicable, include citations to the specific sections of an existing regulation being amended and explain the consequences of the proposed changes.

The Biosolids Use Regulations (Regulations) provide the means to protect public health from improper and unregulated disposal of sewage sludge. However, the opponents of the land application of biosolids have insisted that local governments enact local ordinances that are more restrictive than the state regulations. The amendments to the Biosolids Use Regulations will address concerns expressed by local governments in discussions with biosolids contractors concerning state permit applications. Local governments in responding to citizen complaints about land application operations have requested that contractors provide advance notice to the county staff and to neighbors of permitted sites, prior to beginning field operations. Other concerns expressed by local governments include, complaint and incident response, spill and road tracking cleanup and a demonstration of financial responsibility for any verified damages and remedial costs. These amendments are designed to provide a consistent and uniform set of state requirements that will address a number of issues that local governments must routinely deal with. It is anticipated that the development of state requirements will eliminate the need to develop non-uniform local requirements in these areas of concern and prevent extended litigation, brought by permitted entities, concerning restrictive local government ordinances.

The requested amendments to the Biosolids Use Regulations will involve the following specific sections of the regulations:

1. 12 VAC 5-585-310

The permitted contractor would be required to furnish evidence of current liability insurance or other methods of assuring financial responsibility (established by regulation) in an amount not less than one million dollars. Such insurance would be necessary to obtain and hold a state permit.

2. 12 VAC 5-585-460

The permitted contractor would be required to notify local governments if required by local ordinance, at least 15 days in advance of commencing land application operations, by submitting written notification that includes information identifying the land application sites, estimated dates of operations and telephone numbers of contact personnel with the contractor, the biosolids producer and the Virginia Department of Health. In addition, The permitted contractor would be required to notify local governments and the Virginia Department of Health within 24 hours of the receipt of a complaint of the actions taken to resolve the complaint. Also, the contractors would be required to document their responses to complaints.

3. 12 VAC 5-585-480

The permitted contractor would be required to post signs at land application sites, if required by the local government, at least 48 hours in advance of commencing land application operations. The signs must be visible and readable from a public right of way and contain specific information. The signs must remain in place both, during and 48 hours following, the land application operations.

4. 12 VAC 5-585-490

The permitted contractor would be required to prevent the drag-out and tracking of dirt, debris and biosolids on public roads from their land application operations. The proposed amendments will include specific requirements for reporting of any off-site spills of biosolids. The permitted contractor is made responsible for assuring and reporting on, the prompt clean up of spills and any tracking of solids onto roads.

Alternatives

Please describe the specific alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action.

The Virginia Department of Health may elect to request the that State Board of Health consider the following alternatives:

1. Do not revise the Biosolids Use Regulations,
2. Revise the entire set of Biosolids Use Regulations, or
3. Revise the sections of the Biosolids Use Regulations dealing only with the Petition for Rulemaking request for amendments.

Failure to provide specific State requirements as requested will likely result in local adoption of ordinances with varying non-uniform requirements, that could have significant financial impacts on the regulated entities. Court challenges are likely to result from inconsistent and overly restrictive local ordinances, leading to expensive litigation. Although additional requests for revisions to the Biosolids Use Regulations have been submitted by local governments and private individuals, the process of revising the entire set of the Biosolids Use Regulations will likely become a long drawn out process, as the land application of biosolids is a highly controversial subject. Thus, the Virginia Department of Health is electing to recommend that only the previously listed sections of the Biosolids Use Regulations be revised at this time.

Public Comment

Please summarize all public comment received during the NOIRA comment period and provide the agency response.

The NOIRA was published in the Virginia Register on November 4, 2002 in Volume 19, Issue 4, Page 601. The public comment period closed on December 6, 2002. A summary of the comments received and the Agency response is as follows:

SUMMARY OF COMMENT

1. Increase the local government notification period for the start of land application operations from 15 days to 30 days.
2. Increase the time period from the posting of signs at the land application site from 48 hours to 30 days.
3. Place specific warning language on posted signs.
4. Provide notification to neighbors of land application sites, specifically warnings to those in poor health and provide guarantees that their health will not be affected by the land application operations. Increase the required buffer distances to further protect neighbors in poor health.
5. Land Appliers must provide written monthly certifications of permit compliance and particularly validate biosolids quality.
6. Establish termination of the permit as the penalty for violations of reporting requirements.
7. Provide for increased minimum liability insurance held by land appliers if so requested by local governments.
8. VDH shall maintain a written record of complaints and investigations.
9. Require Nutrient Management Plans for all land application sites.

AGENCY RESPONSE

1. Local Governments are given the opportunity to comment on proposed land application sites prior to issuance of the permit. The 15 day notification period is adequate to allow for any additional response and to alert the local monitor so that any site specific concerns can be responded to prior to the start of operations..
2. The posting of signs far in advance of the anticipated start of operations may unduly alarm neighbors and result in a "cry wolf again" reaction as many of the land application schedules are modified days to weeks in advance due to variable weather and farming conditions. The 48 hour notification is more likely to serve as a definite notice of land application operations and not serve as a false or misleading notice.
3. The sign language is to provide a concise means of providing neighbors with information as to who should be contacted if they want additional information.
4. There is no verifiable information that the land application of biosolids as currently permitted places neighbors at increased risk for health problems. Thus such restrictive requirements are not justified by information now available. VDH has established an agency working group to monitor health complaints, to ensure that such complaints are thoroughly investigated.
5. Land appliers currently submit monthly reports that contain the information necessary to validate compliance with state and federal regulations.
6. The Biosolids Use Regulations provide for enforcement of issued permits.
7. The financial responsibility requirements for land appliers including minimum insurance, will be set in accordance with the Administrative Process Act and cannot be changed except through a revision to the regulations.
8. VDH will maintain a written record of complaints.
9. Specific Nutrient Management Plan requirements will be developed as part of subsequent amendments to the Biosolids Use Regulations.

Clarity of the Regulation

Please provide a statement indicating that the agency, through examination of the regulation and relevant public comments, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.

In drafting the proposed Regulations, the Board strove to write provisions that are clear and easily understandable by the individuals and entities affected. The Board has determined that the regulations are clearly written and will be easily understood.

Periodic Review

Please supply a schedule setting forth when the agency will initiate a review and re-evaluation to determine if the regulation should be continued, amended, or terminated. The specific and measurable regulatory goals should be outlined with this schedule. The review shall take place no later than three years after the proposed regulation is expected to be effective.

The State Board of Health will review and reevaluate the proposed Regulations within three years of their becoming effective in order to determine whether they should be continued, amended or terminated.

Family Impact Statement

Please provide an analysis of the proposed regulatory action that assesses the potential impact on the institution of the family and family stability including the extent to which the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

The proposed regulatory action will have no anticipated or associated impacts on family rights to educate and supervise children. It will not discourage economic self-sufficiency and family responsibilities and commitments or decrease disposable family income.